

United States Court of Appeals
for the
District of Columbia Circuit



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2213.

772

MAYER NEWMAN, APPELLANT,

vs.

HENRIETTA NEWMAN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED AUGUST 26, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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vs.

HENRIETTA NEWMAN, APPELLEE.

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In the Court of Appeals of the District of Columbia.

No. 2213.

MAYER NEWMAN, Appellant,
vs.
HENRIETTA NEWMAN.

a Supreme Court of the District of Columbia.

In Equity. No. 28779.

HENRIETTA NEWMAN, Plaintiff,
vs.
MAYER B. NEWMAN, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Original Bill.*

Filed Sep. 7, 1909.

In the Supreme Court of the District of Columbia.

In Equity. No. 28779.

HENRIETTA NEWMAN
vs.
MAYER B. NEWMAN.

To the Honorable the Justice- of said Court:

The Bill of Complaint of the above named complainant respectfully shows:

1. That she is a citizen of the United States, resident in the District of Columbia, and has been such since the 23rd day of December, A. D. 1907.

2. The defendant is a citizen of the United States, resident in the

District of Columbia, and has resided therein for a long number of years last past.

3. That the complainant, whose maiden name was Henrietta Reiss, and the defendant were married on the 22nd day of December, A. D. 1907, by the Reverend Doctor Jonas in the City of New York, State of New York, and on the next day, to wit, the 23rd day of December, 1907, journeyed to the City of Washington, D. C., and took up their residence at #1202 North Capitol Street, Northwest, as husband and wife, and so cohabited and lived together until the fourteenth day of November, 1908, with the intervals hereinafter referred to.

4. From the time of her arrival in this city, to wit, December 23, 1907, and during her entire cohabitation, following her said marriage, with the defendant, the defendant treated your complainant with extreme, repeated, and continued cruelty and neglect, and to such a degree that by reason thereof a continuance of said cohabitation became physically unsafe to your complainant; that as a consequence of such treatment your complainant was compelled on or about the 27th day of September, 1908, to leave the house of said defendant and live and remain apart from him until the fourteenth day of October, 1908, when upon the intercession of relatives and friends and upon his repeated and most solemn promises of better conduct and treatment, your complainant returned to live with the said defendant; that thereupon the said defendant began his old course of ill treatment, abuse, and cruelty towards your complainant, to such a degree that she was again compelled to leave him on the fourteenth day of November, A. D. 1908, and from said date has lived separate and apart from the defendant.

5. Your complainant avers that said defendant although worth over and above the sum of fifty thousand dollars (\$50,000.00) and in receipt of a monthly income of over two hundred dollars (\$200.00) from the rents of his real estate besides a large income and revenue from his other enterprises, has, since the date of their marriage, been of the most penurious, miserly, and filthy habits, and that such penurious miserly, and filthy habits have continued from the time of their said marriage until your complainant by reason thereof, and the cruel treatment to which she was subjected by the defendant was compelled to leave him.

6. Your complainant says that from the date of her arrival in this city, to wit, December 23, 1907, she was literally and actually starved by defendant, he failing and refusing to furnish her with the ordinary food and necessaries of life; that on their arrival in the City of Washington, D. C., on December 23, 1907, after having traveled from Philadelphia, Pennsylvania, defendant took her to his residence at #1202 North Capitol Street, and upon their arrival on said evening the defendant provided a box of Uneeda Biscuits and a ten-cent pie for their meal; that from that time the defendant refused to permit your complainant to take up her duties as a wife by attending to the marketing and buying supplies for the home, refusing her funds for this purpose, but insisted upon supplying them himself; that he provided only, and

compelled your complainant to eat and subsist on tainted meat, eggs which were nearly rotten and in a condition unfit for food, and highly rancid butter, and a vegetable not more than once a month, so that for as many as two and three days at a time your complainant was compelled to practically go without any substantial food, with the result that in the ten (10) months during which she cohabited with the said defendant she was reduced, by reason of the privation and starvation to which she was subjected, more than twenty four pounds in weight.

7. That while the defendant occupied the whole of the house, #1202 North Capitol Street, which he owns, and which contains nine rooms and a bath, he only permitted this complainant to have a fire in the kitchen; that no fire was permitted in the said premises during the most severe and cold weather of the winter, nor would he permit the use of gas in said house except in the smallest flame.

4 8. That in the ten (10) months in which your complainant cohabited with the said defendant, he gave her thirty dollars in the aggregate towards the expenses of their home, allowing her none for clothing or other incidental expenses.

9. That on the 10th day of August, 1908, your complainant's mother, residing in New York City died, and on the following day your complainant, with the consent of the defendant, left the District of Columbia for the purpose of attending her funeral; defendant furnished to her railroad transportation but no funds; that on the suggestion of said defendant your complainant continued her visit to his or her various relatives in New York remaining six weeks, so that she could build up her shattered and weakened system; she returned to the District of Columbia on the 22nd day of September, 1908. That upon her arrival at the railroad station in this city, she was met by the defendant; upon reaching their home defendant applied such epithets as "whore," and "bat" to complainant, calling her these names; that upon the said evening defendant threatened to leave her saying that he would fix her, that he bought a new pistol and so threatened the complainant with bodily harm that she sat up the night with the door of her room barricaded, fearing bodily harm and injury from the defendant; that about one o'clock of said night complainant became so alarmed by the threats and violent action of the defendant that she ran to a neighbor's house to obtain protection and finally on complainant threatening to call the police he left their house returning about 4 o'clock in the morning. That upon an examination of the defendant's bed

5 room upon said night she found a new pistol heavily loaded under his pillow; on the following day the defendant directed your complainant to take her wearing apparel and remove from the house, declaring that he would never live with her again, and upon the complainant appearing with an express-man for that purpose he refused to let the said articles of wearing apparel and her trunks to be removed, saying he would chop them up before he would allow them to be removed. On his promise a second time to let the complainant have her trunks, complainant went with her

brother for the purpose, whereupon he again refused to permit her to have them, and upon the next morning complainant is informed and believes, and so charges, he removed her trunks from the said premises, but subsequently returned them to the premises and upon the intercession of counsel finally permitted her to remove them.

10. Your complainant says that during her absence in New York on the occasion referred to in the foregoing paragraph the defendant advertised the furniture in their said house for sale, and was engaged in selling off the same in piece-meal, and had also advertised the house for rent in exchange for his board; that when requested to explain these acts he replied to complainant that he had not expected her to return any more, although complainant wrote to defendant every week during her absence.

11. That during their cohabitation when on account of the condition of the food furnished by defendant complainant asked for money for the purpose of buying food, defendant would swear at

complainant, and fly into passion, cursing complainant, 6 among other things saying, he would see complainant to hell and damnation before he would permit complainant to run their house. That the said defendant is of vile and filthy habits; that for months he refused to bathe, taking but one bath during the time complainant cohabited with him; he wears no underwear and is and has become to your complainant, who is of neat and clean habits, repulsive, and that cohabitation with him in his insanitary condition is dangerous to her health. That by reason of being deprived of ordinary food and the necessities of life the health of complainant became greatly endangered, and that the acts of defendant are and have been of such a nature and degree as to render cohabitation with the said defendant physically unsafe to your complainant, and as a result of the conduct of the defendant towards her and the treatment of her, she became ill, broken in spirits and health, and as aforesaid was compelled by reason of her condition and the cruel treatment and conduct of defendant to leave him on or about the 27th day of September, A. D., 1908.

12. That after leaving the said defendant, as aforesaid, under the circumstances herein set forth, which action on her part was undertaken after conference with members of her own as well as the defendant's family, and by the advice of counsel, the defendant made such earnest and apparently honest representations that he would improve his conduct toward and treatment of her, and would furnish her with the necessities of life, offering to secure and guarantee his action by a payment of one thousand dollars to your complainant to be her property absolutely and to be used by her as an

7 indemnity against any recurrence of his unhusbandlike and unnatural conduct, that our complainant yielding to his protestations of better treatment, and upon the solicitation of members of his family, and with an honest and earnest effort on her part to see if she could improve the defendant's physical condition as well as her own, which as aforesaid, in the meantime had become greatly deteriorated, consented to return and live with the defendant; that the said defendant paid to her the said sum of one thousand dollars

which this complainant deposited in a local bank in her own name, and thereupon on or about the 14th day of October, 1908, your complainant returned to the house of said defendant and undertook to take up the broken thread of her married life; that within two (2) days after her said return said defendant began to upbraid her for having required him to turn over to her the said one thousand dollars charging her with having attempted to defraud him and having married him for his wealth only, and applied the most vile epithets to her, all apparently for the purpose, as your complainant believes, of compelling her to return to him the said one thousand dollars which he had paid to her under the circumstances hereinbefore set forth.

In the agreement of reconciliation the defendant had agreed to pay to her the sum of ten dollars per week for the maintenance of their household. This payment the defendant made for two weeks, thereafter refusing to pay the complainant but five dollars per week, and finally refusing to pay that sum. The defendant then began his old course of treatment so that your complainant having been brought to a very nervous and pitiable condition, and finding her

existence with the said defendant, under the circumstances
8 herein, unbearable and so endangering her life, she was again compelled to leave him going to her relatives in New York City with whom she remained until on or about the 11th day of August, 1909, when having regained her health and normal condition she returned to this city where she now resides. That during the time she was absent in New York City your complainant was for a long time confined to her bed by illness and has been compelled, by reason thereof for the purpose of maintaining herself otherwise, to expend a greater portion of the said one thousand dollars paid to her by the defendant as aforesaid.

13. Your complainant avers that she has no means whatever wherefrom to live; that she is now residing in a furnished room in the neighborhood of the defendant's residence; that the defendant is engaged in the money lending business in the District of Columbia and purchase of tax titles, and is a dealer in real estate; that he has a monthly rental income of at least two hundred dollars from his real estate, and that the real estate assessed to him upon the tax books of the District of Columbia, and upon which he pays taxes, is assessed as of the value of about \$31,000.00. Your complainant files herewith, marked Exhibit H. N. No. 1, a copy of the said real estate and improvements and their respectively assessed value as listed to the defendant upon the books of the Office of the Collector of Taxes for the District of Columbia for the year ending June 30, 1909; that complainant has ascertained that among other houses defendant

9 own- houses numbered 1202 North Capitol Street, Northwest; 1104 O Street, Northwest; 2020 12th street, Northwest, 525 6th street, Northwest, 323 13½ street, Northwest, 618 Glick Alley, Northwest, 616 Glick Alley, N. W.

13. Your complainant further avers that the said defendant though fully able so to do has since the fourteenth day of November, 1908, failed and refused to maintain your complainant.

The premises considered complainant prays:

1. That defendant be required to answer the premises and that process issue directed to him requiring him to appear herein on a day certain therein named.
2. That complainant be decreed a separation from bed and board with defendant.
3. That pending this suit she be allowed alimony, suit money, and counsel fees.
4. That by final decree the defendant be required to pay permanent alimony to complainant.
5. And that your complainant may have such other and further relief as the nature of the case may require.

HENRIETTA NEWMAN.

LEON TOBRINER,
Solicitor for Complainant.

I Henrietta Newman, on my oath do depose and say that I have heard read the foregoing Bill of Complaint by me subscribed and know the contents thereof; that the statements therein made of personal knowledge are true and those made upon information and belief, I believe to be true.

HENRIETTA NEWMAN.

10 Subscribed and sworn to before me this 7th day of September, A. D. 1909.

[SEAL.]

JOHN U. GARDINER,
Notary Public, D. C.

11 *Answer of Defendant.*

Filed Nov. 24, 1909.

* * * * *

For answer to the Bill of Complaint in the above entitled cause this defendant says:

1. He admits the complainant is a resident of the District of Columbia and a citizen of the United States.
2. He admits that the defendant is a resident of the District of Columbia and a citizen of the United States.
3. Answering the Third paragraph this defendant says that the parties were married on the 22nd of December, 1907, by Reverend Dr. Jonas, who is a brother-in-law of the complainant and who was at that time conducting a matrimonial bureau in New York, and it was through an introduction obtained from the said Reverend Dr. Jonas to the complainant herein, for which the defendant paid him the sum of Fifty dollars (\$50.00), that the defendant met and married the complainant; that although he paid the Reverend Dr. Jonas, brother-in-law of the said complainant the sum of Fifty dollars (\$50.00), the amount agreed upon, that after defendant's wife left him as will hereinafter more fully appear, the Reverend Jonas sued this defendant in the Court of Justice of the Peace in the District of

Columbia for Two hundred and fifty dollars (\$250.) balance claimed by him for his services in procuring wife for this defendant, which suit was decided in favor of this defendant. And this defendant says

12 that after his marriage to the complainant on the 22nd day of December, 1907, in New York City, they came to Washington City and lived as husband and wife at 1202 North Capitol Street, and continued to live there until the complainant left the defendant, and that she left him without any cause whatsoever on the part of this defendant.

4. Answering the fourth paragraph this defendant denies that he treated your complainant other than as a kind good and loving husband and he says that in all things he was considerate for her; that since his marriage he has learned that she only married him by reason of his supposed wealth, and she well knew at the time of her marriage that he had been previously married; that his wife had died and that he had a number of grown children; that at the time of her marriage to him she was thirty-eight (38) or (40) years of age and this defendant Fifty-five (55) years of age; that she was residing with her parents, who were in poor circumstances, and that it was at the solicitation of the matchmaking brother-in-law that he married her and that after the marriage he did all he could to make her lot a happy one, bringing her to his home here; that prior to the marriage he fully explained to her his condition in life, but she seemed to have an idea that he was exceedingly wealthy, and when she discovered otherwise great dissatisfaction ensued. That apparently matters moved satisfactorily, excepting that the complainant acquired a taste for strong drink and on several occasions she was helplessly drunk in bed, and her interference in his business of selling real estate he had bought at tax sales and her continued demands for money and refusal to sign quit-claim deeds to enable this

13 defendant to transfer title to properties that he had acquired at tax sales, often demanding not less than one-half ($\frac{1}{2}$) of the amount received, when this defendant was obliged to pay her. That this continued from the 22nd day of December, 1907, the time of the complainant's marriage to the defendant, up to August 10th, 1908, at which time she received a telegram to the effect that her mother had died. That upon receipt of the telegram this defendant gave her Fifty dollars (\$50.) thirty dollars (\$30.) for spending money for two weeks (the time she said she would be absent) and Twenty dollars (\$20.) for a mileage ticket over the Pennsylvania Railroad. After the expiration of the two weeks the complainant did not return, but wrote a letter requesting money, which this defendant did not send as he was anxious for her to return to this city, and the complainant remained away for six weeks, this defendant not knowing whether she was in New York or where she was. After an absence of six weeks defendant received a letter stating that she would arrive in Washington that evening, which she did. Defendant met her at the station and went at once to his home, and from the time of her arrival she quarreled continuously with him because he did not send her the money she asked for, and her language became very profane and this defendant informed her that

she was only to stay two weeks and that he had not at the time the money and therefore could not send it to her. Upon reaching their home she called him a dirty dog, which was one of her favorite expressions. That during the absence of complainant this defendant was obliged to care for himself, having no once in the house to look

14 after his comforts; he was obliged to cook his own meals and he was in ill health at the time, all of which his wife knew.

That this defendant had not prepared supper for his wife thinking they would go out, but she refused to do so and she abused him continuously until he went to bed and even after he went to bed until about one o'clock in the morning, when her abuse became so intense that this defendant got up and dressed and went to Union Station, remaining until about three o'clock in the morning when he again returned home and found his house barricaded and chairs placed on the inside to prevent his entering. He finally managed to move the chairs and entered. The bed was not occupied and this defendant does not know whether *he* wife was still in the house or not. That he had a nice comfortably furnished house with nine rooms. The next morning on going up stairs the defendant found his wife packing her clothes. She did not prepare breakfast. She thereupon left the house and returned in about thirty minutes with express wagon and two men. This defendant remonstrated against his wife leaving and protested against the men taking the trunks, but his wife rang up the police station and reported him. She called this defendant the vilest names, threatened to run all kinds of bills which he must pay and left the house, going to 46 M Street, Northwest; that every evening defendant received letter from her attorney Mr. Leon Tobriner, asking him to call on a matter of importance. This defendant says he did not force his wife to leave the house on the 14th of October, 1908, or at any other time; that on the contrary he pleaded with her and her attorney to have her continue to live with

15 him; that the very evening she returned from New York she refused to have anything to do with him and left the next

morning despite his importunities that she remain and his promise to do all she wished. This defendant went so far as to write to her cousin, Louis M. Friend of New York, asking him to intercede in his behalf to have complainant live with this defendant, as this defendant had a strong affection for his wife and desired to have her live with him. Mr. Friend came to Washington in response to a telephone message from the complainant and before the letter of this defendant was delivered to him. Mr. Friend urged this defendant to meet him and the complainant at the office of Mr. Tobriner, and being very anxious to have his wife come and live with him, he finally consented to meet her at her lawyer's office. Realizing his physical condition and wishing to have a helpmeet, and believing that his wife would realize her duty to him, he agreed at their solicitation to give his wife the sum of One thousand dollars (\$1000.) and to pay Fifty dollars (\$50.) for her lawyer's services. It was further agreed that he should give her the sum of Ten dollars (\$10.00) per week for her household expenses which he did each and every week until she left him as appears hereinafter, but it was upon

the distinct understanding that his wife should return to him and live with him and there should be no further contention between them, and that all differences should be adjusted and settled by the payment of the Thousand dollars.

After receiving the One thousand dollars (\$1000.) complainant returned to the house and continued to live with the defendant peaceably for about one and one-half weeks when she began abusing him,

16 calling him a dirty dog, and trying her utmost to bring about a quarrel which, as often as he could, this defendant prevented by not replying to her, often taking her insults in silence, and oftentimes leaving the house for the purpose of avoiding disputes. That she left for New York on the 11th day of August, 1908 and did not return to this city until the 27th day of September, 1908, at which time she again left him and remained away until the 14th day of October 1908, the time he paid her the thousand dollars; she then returned to this defendant and remained with him until the 14th of November, 1908 (a period of one month) when she again left him without cause and has lived separate and apart from the defendant ever since; that he charges when she left him on the 27th day of September, 1908, it was part of a plan on the part of herself and her relatives to force this defendant through his affection for her to give her a large sum of money and thereafter return and live with the defendant but a short time and finally leave him; that the defendant did give her the money and that she did thereafter leave him. That in this respect complainant practiced a fraud upon the defendant obtaining under false pretenses the said sum of one thousand dollars (\$1000.) when she knew at the time she had no intention of continuing to live with him; that he fully kept his part of the agreement, gave her the thousand dollars and paid ten dollars a week to her, and without any cause whatever she left him again on the 14th day of November, 1908, without any cause and without even telling him but simply left him, and during the period of one month she lived with him she made his existence a perfect hell on earth by her violent language and treatment, telling him she did

17 not care for him, and treating him with the utmost indifference and contempt, going to such an extent as to hit this defendant with a chair. This defendant has borne in silence the taunts and cruel treatment practiced on him by his wife, who is a strong robust woman and who caused him a great amount of mental distress and physical pain. That it is his desire to live with his wife and he is willing that she should live with him, provided she conducts herself as a wife should, and he is willing to provide for her to the full extent of his ability and capacity and hereby tenders her a comfortable home with him, provided she conducts herself as a wife should, but he asks that if she continues to live apart from him that she be required to account to him for the one thousand dollars he paid her under the arrangement that she should return to his home and live with him.

5. This defendant denies that he is worth the sum of Fifty thousand dollars (\$50,000.) or that his income is Two hundred (\$200.00) per month, and says his worth is as shown by statement

hereto annexed and made part hereof and in said statement he shows his monthly income; that he is not in any business or interested in any enterprises and has no income other than the rents received from his properties, upon which he is obliged to maintain himself, and that these rents are subject to a commission of five per cent to the real estate agent for collecting the same, and often a number of the houses are vacant and that all of these houses are badly in need of repairs.

This defendant denies that his habits are such as are set up in this paragraph and he says that the allegations that his habits are 18 filthy and that he is penurious and miserly are unfounded and untrue and are only made to excite sympathy for her, and he says that he has sustained grievous and irreparable injury by the publication of her bill of complaint in which these unfair, untrue and injurious statements were made, and her sole object in making these statements was to obtain their publication in the newspapers and to prejudice him in the eyes of the Court and of the public, and he denies that the complainant was obliged to leave him for the reasons in her bill of complaint set forth and he says that he has lived in accordance with his station and income, and attaches hereto a statement of the property owned by him, showing tax titles and other property owned by him, showing which property has been set aside by reason of imperfect tax sales, which properties are non-productive and which properties are productive; also showing the amount of taxes he pays on same, insurance, commission and showing his net income per month.

6. Answering the Sixth paragraph this defendant denies the allegations therein set up and says that when he came to this city with his wife he had a housekeeper; that there was an abundance of canned goods and groceries in the house, plenty to eat and drink, and that this complainant and defendant had supper in Philadelphia and arrived home very late at night and the housekeeper had made little preparation for their arrival; that his wife was always well supplied with money for marketing, this defendant attending to it at various times at her solicitation. That he denies he bought

tainted food or rancid butter; that he forced her to eat food 19 that was unfit in any way, but gave her the same kind of food which he himself ate and he says that whatever conditions may have existed, and he denies the conditions existed as set forth in this paragraph, yet the complainant was quite willing to reconcile herself to the life she led with this defendant upon payment to her of the sum of One thousand dollars as set forth in the preceding paragraph. That she took this one thousand dollars and returned to live with him but did so only for a period of a month. That if the conditions had existed as stated, and he denies that they did, yet she had by her own showing the sum of one thousand dollars in bank which she could have used and also the ten dollars a week which this defendant gave her under the agreement that she should return to him and she had no excuse whatever for leaving him and should be required by the Court to return to him and fulfil her marital obligations. That he is ready and willing to provide for and take

care of her, and that he should not be required, in addition to her retaining this one thousand dollars, which she obtained under the circumstances set forth in the preceding paragraph, to pay this complainant further sums for maintenance, as she has ample means of her own. And this defendant says that the things set forth in the bill as occurring at the time of their wedding trip and thereafter are not true; that from the time of their marriage until she left to visit New York their relations were not strained and the complainant apparently felt some affection for him, but her hostility apparently began upon her return to this city from New York.

This defendant denies that at any time the complainant had to go without her meals and that she lost weight through any 20 fault or his or any action of his. That when she returned from the City of New York as hereinafter more fully set forth her weight was greatly reduced, caused apparently by worry and trouble at nursing her father in his last illness, and also by her father's death.

7. This defendant denies the allegations in this paragraph and says that he supplied a comfortable home for his wife and that the house was well heated and had gas and she could use all the heat and gas she pleased. That the complainant had said she desired to give up such a large house and this defendant had agreed to move into a flat, and that she was out looking for apartments the day before she left him, and her leaving him was a total surprise to him.

8. This defendant says that the complainant only lived with him for eight months and not for ten months as claimed by her, and he denies that during said time he only gave her Thirty dollars (\$30.) in the aggregate toward the expenses of the home allowing her nothing for clothing or incidental expenses for herself, but that he supplied all the necessaries for the table and gave her as much money as she required, and in addition to this she had in her possession as wedding presents from his relatives a large sum of money which she retained, had deposited to her credit in bank and this defendant says that this complainant cannot be heard to complain of what occurred between herself and him during the said period of time she lived with him for that all differences which had existed during the said period of time had been settled and adjusted between the 21 complainant and this defendant by the payment by this defendant to the complainant the sum of One thousand dollars

which was accepted by her upon the distinct agreement that she return and live with him, and that upon her return she remained for a period of one month, breaking faith with him, and he says that her sole cause for complaint now appears to be for things occurring prior to the receipt by her of the said sum of One thousand dollars.

9. Answering the Ninth Paragraph this defendant says that the complainant's stepmother died on the 10th day of August, 1908, and says that she left to attend the funeral in response to a telegram she received; that it was not to build up to her system as stated in this paragraph as her health was good and she had not complained that she needed any change or needed a rest; that the defendant made no objection to her going to the funeral as she expressed a wish to do

so; and it is not true that the defendant did not furnish her funds for the trip, as this defendant says that he gave his wife the sum of Fifty dollars (\$50.), thirty dollars of which was for her hotel bill and other expenses and twenty dollars was for her mileage book. That while she was in New York he received loving letters from her and that from the tone of the letters she was evidently satisfied with him. It is also true that the complainant visited the relatives of the defendant while she was in New York and that this defendant asked her to do so and that she returned to the District of Columbia on the 27th day of September, 1908. This defendant denies that he called or applied to her the names or epithets set forth in this paragraph,

or that he threatened her in any way, or that he had bought
22 a new pistol for the purpose of doing her harm or injuring
her in any way whatsoever, or that he ever had or has any
intention of hurting or injuring her, and this she well knows, and
this defendant says that in the third paragraph of this answer he has
set forth what occurred upon her return to this city. And the de-
fendant says that the complainant knew that he had a pistol in the
house and had a pistol before his marriage and intended to have one
for his protection against burglars, and he says that while his wife
was in New York burglars broke into his house and stole a quantity
of stuff for which they were arrested and convicted, and as he was
unable to find the pistol that he owned, he bought a new one and
kept it under his pillow at night for protection against any further
attempt to rob him. And he says he did not direct her to take her
wearing apparel and remove from the house, but on the contrary
strenuously opposed her leaving and declined to deliver up her things
until advised by counsel to do so. That in no respect did he attempt
to molest her but was desirous that she remain and live with him.

10. Answering this paragraph this defendant says that he adver-
tised some of the property for sale as there was more furniture in
the house than was needed; that he only sold one writing table for
which he had no use; that he advertised the house for rent in ex-
change for his board, desiring to board with his tenants during his
wife's absence but only until his wife returned, as there was every
indication of her making a long stay. He denies telling his wife
that he did not expect her to return.

11. This defendant denies each and ever- of the allegations
23 contained in this paragraph, or that he ever used the language
therein set forth, or that he is of vile and filthy habits. He
denies that his habits are such as she set forth, and says that he
bathed as frequently as sanitary rules, or in fact common decency
required; that it was his usual custom to bathe daily and in severe
cold weather not less than twice a week, and this the complainant
well knew, and he says that even if these things were true she cannot
be heard to complain by reason of her accepting from him the sum
of One thousand dollars, and her promise to return and live with
him, and denies that she left him for any cause set up in this para-
graph as none such existed. And this defendant says he wears at all
times underwear and all necessary clothing, that his habits are clean
and proper; that his life and mode of living fully equal that of the

complainant and he had given her no cause for her feeling of revulsion which she says she entertains for him; that she should entertain kind and loving regards for him and should conduct herself towards him as a good wife.

12. This defendant says that when his wife left him he did everything in his power to have her return. That despite her conduct towards him he had and has a strong affection for her; that he believed she had been prejudiced against him in some way, and even went so far as to offer to pay her the sum of One thousand dollars if she would return to him, and he says that she did return but for a short period of time and nothing occurred during said time to justify her again leaving him. That she did not make an honest and earnest effort in any direction as shown by the short time she continued to live with him. She deposited the One thousand

24 dollars to her own credit and this defendant says he kept

every promise he made to her, and denies that two days after her return he began to upbraid her or make the charge set forth in this paragraph, or applied any vile epithets to her. That he permitted her to keep the said One thousand dollars and endeavored to live happily with her, but says that upon her receiving the said one thousand dollars and after her return to the house she appeared dissatisfied and continually quarreled with this defendant and called him a dirty dog, and that on or about November 10, 1908, she picked up a chair and struck this defendant over the head with it, and had not this defendant warded off the blow by raising his arm he would have been seriously injured; that on November 14, 1908, she left him supposedly for the purpose of renting a flat which this defendant had agreed to rent and move in as his wife desired him to do so, but that instead of doing this she abandoned him and has not returned to him since.

This defendant on returning about 3:00 P. M. on the said date found a notice addressed to Mrs. Myer B. Newman stating that there was a dispatch at the Postal Telegraph Office. Defendant then went into the house and found that his wife's trunks had been taken away, and also all the bric-a-brac, jewelry, silverware, etc. The defendant then went to the telegraph office and asked for the dispatch, notice of which had been left at the house. He was informed at the telegraph office that they had received a request by telephone to deliver the message to 46 M Street, N. W., where he was informed his wife had boarded. Upon request he was shown by the telegraph

operator the original despatch which read: "Mrs. Myer B.
25 Newman. Have left Willard Hotel and moved to room 401

Richmond Hotel. Going to New York, Pa." Signed "Daniel O'Keefe." And this defendant says that the said Daniel O'Keefe boarded at 46 M Street, N. W. at the time his wife boarded there. And this defendant says that it is not true that his conduct in any way caused his wife to leave him on November 14, 1908, or that he failed to properly provide for her, and he says that he was glad their differences had been adjusted on October 14, 1908 and hoped no further dissatisfaction would arise, and did all in his power to

make her contented, but it seemed that having received the One thousand dollars (\$1000.) she had no further use for *her*.

13. Answering paragraph Thirteen, this defendant says that his wife still has the One thousand dollars (\$1000.) he gave her and from her appearance seems to have ample funds. That she appears to be in excellent health and is well dressed, and has until recently lived part of the time in New York and part of the time at seaside resorts. The defendant says that he has not been in the money-lending business for several years past, or a dealer in real estate and that by reason of his being required to pay the one thousand dollars and other expenses, and the refusal of his wife to join in quit-claim deeds, he was unable to make any purchases whatever at the 1909 Tax Sale, but that a large number of pieces of real estate that he had bought at previous tax sales he lost by reason of the same property being sold by the District of Columbia for unpaid taxes, on account of his inability to pay the 1908 tax thereon. And the defendant annexes hereto and makes part hereof a list of the

26 property with full explanation thereof. That of the houses mentioned in this paragraph this defendant says house No. 323 13½ Street Northwest, was never owned by him, nor has he any interest therein. That he owns house No. 1202 North Capitol Street, 1104 O Street, 2020 12th Street, 616 Glick Alley and 525 6th Street, N. W., upon which there is an encumbrance of \$3500. That of all the other properties mentioned this defendant only has tax titles to and receives no income therefrom. That the value of same is uncertain, and in fact they are valueless to this defendant unless the owners redeem same and his wife joins in the tax deeds, which ~~she~~ has heretofore refused to do without payment therefor. That this defendant has no other source of income. That since November 14, 1908, she signed two quit-claim deeds for which he was required to pay her the sum of Thirty dollars.

14. Answering the Fourteenth Paragraph this defendant says that since the 14th day of November, 1908, he has not refused to maintain the complainant, but has been at all times and is now perfectly willing to do so, but that the complainant has prevented this defendant from maintaining and supporting her by her leaving him and her refusal to live with him, and he asks that she be required to return to his home and live with him, and he says that he is willing to provide a suitable and comfortable home for her and to maintain and support her to the best of his ability.

This defendant says that the said complainant by her said bill has not set forth a cause of action entitling her to the relief prayed for, and he prays the same benefit to this objection as if he had specifically demurred thereto.

27 And having fully answered he prays to be hence dismissed with his reasonable costs.

MEYER B. NEWMAN.

WOLF AND ROSENBERG,
Att'ys for Defendant.

DISTRICT OF COLUMBIA, ss:

I, Meyer B. Newman, being first duly sworn, on oath depose and say that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts therein stated upon my own personal knowledge are true, and those stated upon information and belief, I believe to be true.

MEYER B. NEWMAN.

Subscribed and sworn to before me this 23d day of November, A. D. 1909.

[SEAL.]

HARRY S. WOLF,
Notary Public, D. C.

Property Owned in Fee Simple by Myer B. Newman.

House No. 2020 12th Street, N. W. being lot 1 in Square 273:

Value of property..... \$3500.

Rents for \$30.00 per month, is now vacant and has been vacant for over eight months.

Taxes per year..... \$50.25
Water Rent..... 10.00

House will require about \$250 to put in good condition.

28 House No. 1104 O Street, N. W., being Sublot 12 in Square 313:

Value of property..... \$2500.

Rents for \$28.50 per month.

Has been vacant for five months and present tenant threatens to vacate unless repairs are made.

Taxes per year..... 37.20
Water Rent..... 9.60
Real estate Agent's Commission 5% of \$28.50 per month \$1.43 per year..... 17.16

Will cost about \$100 to make necessary repairs.

House No. 525 Sixth Street, N. W., being part of Lots 7 and 9 in Square 488:

Value of property..... 5000.

Rents for \$45.50 per month.

Taxes per year..... 84.33
Water Rent..... 9.20
Interest on trust of \$3500. per year..... 175.00
(Trust due in March 1910.)

Will cost about \$60.00 to repair this house.

Present tenant has failed to pay rent for present month and there is every probability that this house will be vacant Seven days' summons having been served on present tenant.

House 616 and 618 Glick Alley, being Lots 49 and 50 in Square 442:

Value of property..... \$550.00
 Rents for \$7.50 each per month.
 Total \$15.00.

Taxes per year..... 13.46
 Water rent..... 9.00

Will take about \$40.00 to repair property.
 29 One of said houses is at present vacant.

House 1202 North Capital Street, being Lot 144 in Square 619:

Value of property..... 3000.00
 Rents for \$35.50 per month.

Taxes per year..... 44.12
 Water Rent..... 7.60

Will take about \$40.00 to repair this property.

These are all the properties on which an income is derived.

The total value of above properties amount to the sum of 14,550.
 If all of above properties are rented the total amount would be the sum of per month 154.50 or total per year of..... 1854.00

Less—
 Taxes per year..... 229.36
 Water rents..... 45.40
 Estimated cost of repairs to properties.... 490.00
 Interest on \$3500 loan..... 175.00
 Commission to Moore & Hill for collecting rent of 1104 O St., N. W..... 17.16

 956.92 956.92

Balance income per year if all properties are rented 897.08

By reason of vacancies present income amounts to the sum of per year..... 1404.00

Less—
 Expenses 956.92
 Balance 447.08
 Making monthly income of..... 37.25

30 Property Owned and Non-productive and its Worth.

Lot 146 in Square 619 value \$700 Taxes \$10.20.

Lot 804 in Square 2863 " 1500, " 22.50.

This property sold for 1909 taxes and there is lien of \$645.88 against it for the widening of Sherman Avenue.

Costs about \$3.00 per year to have weeds cut down.

Lot 812 in Square 2885 Value \$600. Taxes 11.25.

Lien against property for widening of Sherman Avenue \$26.32.

That all the other properties mentioned in the Exhibit to Complainant's bill of complaint are tax titles acquired by the defendant and all of them are non-productive to this defendant and that all of the lots in Square- 63 and 89 have been set aside by reason of illegality of the tax sale.

Sublot 32 in Square 3083 in the complainant's Exhibit is not owned by this defendant.

That of the lots set forth in the said Exhibit Lots 26 and 27 in Square 5224, Lots 32 in Square 5226, Lot 3 in Square 5842, Sublot 33 in Square 353, and the 219-4, 219-8, 219-3 appearing in said Exhibit of Complainant were tax titles purchased by this defendant, but which at the last tax sale were sold for the non-payment of prior taxes, as this defendant was unable to pay said taxes.

Defendant is also the owner of Lots in Block- 16, 20, 21, 23, 24, 27, 33, 34, 42, 50, 54, 55, and 60 and Lots in Cung B and C valued at \$802, which cost him at tax sales \$19.24. The said properties being in Takoma Park.

31

Recapitulation.

From an examination of this statement it will appear that the defendant owns in fee property of the value of. \$18,152.

Less:

Encumbrances and liens of the District thereon amounting to the sum of..... 5,172.20

Making his net worth the sum of.....	12,177.80
That his total monthly income as shown by annexed statement amounts to the sum of.....	\$154.50
Less expenses, Net income per month.....	74.25
That his present income considering the vacancies amounts to the sum of per month.....	71.50

Less Expenses.

That of the Tax Titles owned by this defendant he calls attention to the fact that they are all subject to attack by the court on the question of the validity of the sales and that there are at present a number of owners claiming illegality of tax sales to this defendant, and that he is not in receipt of any income from any of the properties held by him under tax sales.

32-54

Reference to Examiner.

Filed Dec. 18, 1909.

* * * * *

Upon motion of the complainant, it is, by the Court this 18th day of December, A. D. 1909, ordered that this cause be and the same is hereby referred to A. H. Galt, Examiner in Chancery, of this Court, to take such proofs as may be adduced by the respective parties.

By the Court,

JOB BARNARD, *Justice.*

* * * * *

55

Decree.

Filed Jul- 2, 1910.

* * * * *

This cause coming on to be heard in open court upon the pleadings and the testimony of the plaintiff, and Louis Friend, Isaac Reiss, Charles Yaeger, Julia Lyons, Elizabeth Quill, Mary E. Knorlein, Mrs. Charles Johnson, Edna Quill, and John Quill, witnesses produced on behalf of the plaintiff, and the defendant and Lucy LeRout, Mary A. Koontz, W. Walton Edwards, and Mary McMahon, witnesses on behalf of the defendant, whose testimony is heard in open court, as also upon the documentary evidence adduced by the respective parties, and the same having been duly considered by the court, it is, this 2nd day of July A. D. 1910, adjudged, ordered and decreed that the plaintiff be, and she is hereby, decreed a legal separation from the bed and board of the defendant on the ground of cruelty of said defendant to her.

It is further adjudged, ordered and decreed that the defendant pay to the plaintiff, or her solicitor of record, the sum of sixty dollars (\$60) per month for the months of July, August, September, October, November, and December 1910, as alimony, to be paid on the 15th days of each of said months, and the sum of seventy dollars (\$70) per month as alimony commencing with the month of January 1911, to be paid on the 15th day of January 1911 and on the 15th days of each and every month thereafter until the further order of the court;

56 It is further adjudged, ordered and decreed that the defendant pay to the solicitor of record for the plaintiff the sum of Four Hundred Dollars as counsel fees; and that the plaintiff do recover of the defendant her costs herein to be taxed by the clerk, and have execution therefor as at law.

And this cause is reserved for such further proceedings looking into the sequestration of the property of the defendant as may hereafter become necessary for the enforcement of this decree.

THOS. H. ANDERSON, *Justice.*

Appeal to Court of Appeals.

Filed Jul- 15, 1910.

* * * * *

The Clerk of said Court will enter my appearance as attorney for defendant; note an appeal by defendant to the Court of Appeals from the Decree filed herein and issue citation to plaintiff.

WHARTON E. LESTER,
Attorney for Defendant.

57 Filed Jul- 18, 1910. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

No. 28779. In Equity.

HENRIETTA NEWMAN
vs.
MAYER NEWMAN.

The President of the United States to Henrietta Newman, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal noted in the Supreme Court of the District of Columbia, on the 15th day of July, 1910, wherein Mayer Newman — Appellant, and you are Appellee, to show cause, if any there be, why the Decree rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 15th day of July in the year of our Lord one thousand nine hundred and ten.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By F. E. CUNNINGHAM,
Ass't Clerk.

Service of the above Citation accepted this — day of —, 190—.

_____,
Attorney for Appellee.

[Endorsed:] 7. No. 28779. Equity. Newman vs. Newman. Citation. Issued July 15, 1910. Served copy of the within Citation on Henrietta Newman Personally July 16th 1910. Aulick Palmer, Marshal. O. — —, Attorney for Appellant. Filed Jul- 18, 1910. J. R. Young, Clerk.

Memorandum.

July 20, 1910.—Appeal bond approved and filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed Jul- 28, 1910.

* * * * *

The clerk of the court will please prepare transcript of record on appeal, including therein:

1. The original bill of complaint.
2. Answer of defendant and exhibits thereto.
3. Order of reference to examiner.
4. Testimony taken and filed.
5. Decree.
6. This designation of record.
7. Order of reference to examiner.

WHARTON E. LESTER,
Attorney for Defendant.

Copy of above received this 28th day of July, 1910.

LEON TOBRINER,
Attorney for Plaintiff.

59 *Directions to Clerk for Preparation of Transcript of Record.*

Filed Aug. 3, 1910.

* * * * *

This cause having been heard in open court and the evidence of the witnesses named in the decree herein having been taken stenographically, the clerk of the court, in preparing the transcript of record on appeal herein, will include therein the testimony of the witnesses named in said decree, and this designation.

LEON TOBRINER,
Attorney for Complainant.

NOTE.—A careful search of the records of this Court in this cause, shows that no testimony, other than that already copied herein, was filed of record in this cause.

60 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 59, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 28779, in Equity, wherein Henrietta Newman is Plaintiff and Mayer B. Newman is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 24th day of August, 1910.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,
By ALF G. BUHRMAN, *Ass't Clerk*.

61 Court of Appeals of the District of Columbia, April Term, 1910.

No. 2213.

MAYER B. NEWMAN, Appellant,
vs.
HENRIETTA NEWMAN.

The appellant, by his attorney, files this, a brief statement of the supposed errors for which he prosecutes the appeal, with the Clerk of this Court, and says that in his opinion:

1. The pleading and testimony herein do not support the decree entered, or the findings therein set forth.
2. Nothing appears in the pleadings or in any testimony herein which justifies the decree of separation between the parties hereto.
3. Nothing appears in the pleadings or in any testimony herein which justifies the adjudication requiring appellant to pay appellee alimony in the amount as in said decree set forth, or requiring appellant to pay counsel fees or costs, as in said decree provided.
4. The testimony of all the witnesses named in said decree, and upon which said decree is based, having been heard orally in open court, and not reduced to writing or filed of record herein, must be disregarded in this court.

And it appearing in and by said decree, that the testimony of Mabel Kaminska was not considered by the trial court in granting said decree, appellant requests the clerk to omit the testimony of the said Mabel Kaminska from the record to be printed herein (the same beginning on page 32 of the transcript of the record immediately following the reference to the examiner, and extending through page 54 of said transcript), and he hereby designates the remaining part of said transcript as necessary for the consideration of the questions involved.

WHARTON E. LESTER,
Attorney for Appellant.

Copy of the above received this 26th day of August, 1910.

LEON TOBRINER,
Attorney for Appellee.

62 (Endorsed:) No. 2213. Meyer B. Newman, appellant, vs Henrietta Newman. Designation of record to be printed, &c. Court of Appeals, District of Columbia. Filed Aug. 27, 1910. Henry W. Hodges, Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 2213. Mayer Newman, appellant, vs. Henrietta Newman. Court of Appeals, District of Columbia. Filed Aug. 26, 1910. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT. 12-1910

Henry W. Hodges.
 Clerk.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2213.

MEYER B. NEWMAN, *Appellant,*

vs.

HENRIETTA NEWMAN.

Brief on Behalf of Appellant.

WHARTON E. LESTER,

Attorney for Appellant.



Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2213.

MEYER B. NEWMAN, *Appellant*,

vs.

HENRIETTA NEWMAN.

BRIEF ON BEHALF OF APPELLANT.

The original bill herein prayed for separation from bed and board, alimony and counsel fees. It required an answer under oath, which was duly filed. In accordance with the rules of the Supreme Court of the District of Columbia, the cause was referred to an examiner to take testimony (Rec., p. 18). One deposition was taken before the examiner, and was filed in the cause, but it was not considered by the trial court, and was not printed, appellant having designated the part of the Record to be printed, which designation was concurred in by appellee, for he did not object thereto (Rec., p. 21).* It appears that the other testimony taken in the cause was heard in open court, was not taken before an examiner, was not reduced to writing and was not filed in the cause. The decree itself was founded upon the testimony of the witnesses therein named, "whose testimony is heard in open court," but which was not written

*Counsel for appellant took no part in the cause till after the decree had been signed and is not responsible for the condition of the record.

or filed in the cause (Rec., p. 18). It also appears from the note made by the clerk that no testimony other than the one deposition hereinabove mentioned was filed in the cause, and that the clerk prepared "a true and correct transcript of the record according to direction of counsel herein filed" (Rec., p. 20).

The decree of the lower court granted a separation, awarded alimony and counsel fees, and reserved the cause for proceedings looking to the enforcement of the decree (Rec., p. 18).

ASSIGNMENT OF ERRORS.

1. The court erred in granting a decree of separation.
2. The court erred in the amount of counsel fees and of alimony allowed.
3. The court erred in granting any decree upon oral testimony not reduced to writing and filed in the case.

These several assignments can be dealt with together briefly.

Section 1061 of the Code provides:

"TESTIMONY IN EQUITY CAUSES.—In equity causes in the District the testimony of the witnesses may be taken in the manner provided by the rules of the Supreme Court of the United States for practice in equity, and of the Supreme Court of the District of Columbia not inconsistent therewith: *Provided*, the court may, in its discretion, for proper cause shown, order the testimony to be taken orally in its presence or under a commission, according to the usages of chancery, or before examiners, * * *"

The rules of the Supreme Court of the United States are practically copied as rules of the Supreme Court of the District of Columbia. Equity Rule 72 of the latter court provides:

"In suits for divorce, or for nullity of marriage, the court shall order a reference to an examiner or commissioner, to take proof of all material facts * * *"

Rule 45 provides for the manner of taking testimony in equity causes, the last sentence of which is:

"Nothing herein contained shall prevent the examination of witnesses *viva voce* in open court, if the court shall deem it advisable."

Rule 46 deals with the subject of taking testimony, and closes with the following paragraph:

"Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole or any specific part, of the evidence to be adduced orally in open court on final hearing."

It has been the practice of the Supreme Court of the District of Columbia for testimony to be reduced to writing and filed in the cause, and there is nothing in the rules of the court, or any statute to the contrary. The rules are practically the same as those of the United States Supreme Court, where the question now presented has been decided in the following cases:

New Orleans *vs.* United States, 5 Peters, 449.
Conn *vs.* Penn, 5 Wheaton, 424.
Blease *vs.* Garlington, 92 U. S., 1.

In the latter case the court said:

"In Conn *vs.* Penn, 5 Wheat., 424, decided in 1820, this court held that a decree founded in part upon parol testimony must be reversed, because that portion of the testimony which was oral had not been sent up. For this reason, among others, the cause was sent back for further proceedings according to equity. Chief Justice Marshall, in delivering the opinion of the court, said (p. 426):

'Previous to this act (that of 1803), the facts were brought before this court by the statement of the judge. The depositions are substituted for that statement; and it would seem, since this court must judge of the fact as well as the law, that all the testimony which was before the Circuit Court ought to be laid before this court. Yet the section (of the act of 1789) which directs that witnesses shall be examined in open court is not, in terms, repealed. The court has felt considerable doubt on this subject, but thinks it the safe course to require that all the testimony on which the judge finds his opinion should, in cases within the jurisdiction of this court, appear in the Record.'

"Under the authority of the Act of May 8, 1792, 1 Stat. at L., 276, Sec. 2, this court, at its February term, 1822, adopted certain rules of practice for the courts of equity of the United States. 7 Wheat., Rules 25, 26 and 28 related to the taking of testimony by depositions, and the examination of witnesses before a master or examiner; but by Rule 28 it was expressly provided that nothing therein contained should 'prevent the examination of witnesses *viva voce* when produced in open court.'

"These rules continued in force until the January Term, 1842, when they were superseded by others then promulgated, of which 67, 68, 69 and 78 related to the mode of taking testimony, but made no reference to the examination of witnesses in open court, further than to provide, at the end of Rule 78, that nothing therein contained should 'prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.'

* * * * *

"While, therefore, we do not say, that, even since the Revised Statutes, the circuit courts may not in their discretion, under the operation of the rules, permit the examination of witnesses orally in open court

upon the hearing of cases in equity, we do say that now they are not by law required to do so; and that, if such practice is adopted in any case, the testimony presented in that form must be taken down or its substance stated in writing and made part of the Record, or it will be entirely disregarded here on an appeal. * * *

The practice is the same in the Federal Courts.

In *Mears vs. Lockhart*, 94 F. R. 274, oral testimony was taken at the hearing as in this case. The court said:

“The record fails to show any of the evidence, except the contract or agreement under which appellant claims * * * but there is nothing whatever in the record showing upon what evidence the court below rendered a decree in favor of appellee. *On appeal from a decree in equity the record must show some evidence to sustain the finding; otherwise the decree will be reversed.* * * *” (Italics mine.)

The answer of defendant below is sworn to, and, accompanied by an inventory of his assets, shows conclusively that the court below erred in allowing so much alimony—practically all appellant’s income.

It is submitted that the decree should be reversed.

Respectfully submitted,

WHARTON E. LESTER,

Attorney for Appellant.